

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1033

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AS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. T 4094

UNITED STATES OF AMERICA

Appellee

CLYDE O. LEACH

Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR APPELLANT CLYDE O. LEACH

Norman Cohen
Attorney for Clyde O. Leach
(Appointed by this Court)

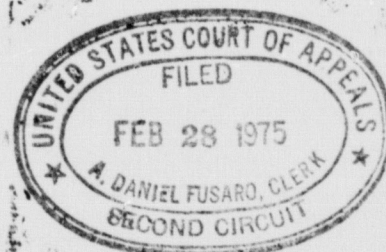


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CLYDE O. LEACH

Defendant - Appellant

BRIEF FOR APPELLANT CLYDE O. LEACH

STATEMENT OF ISSUES

- I. Whether the District Court erred by failing to grant Defendant's motions to dismiss the indictment because it was based almost entirely on the hearsay testimony before the Grand Jury of Special Agent James C. Mee of the Federal Bureau of Investigation and the Government failed to make any showing that the witnesses with firsthand knowledge were unavailable or that to summons such witnesses would have placed an undue burden on the Government.
- II. Whether the opening remarks of the Prosecutor which referred to the Grand Jury, its composition and the indictment it returned were so prejudicial as to require a mistrial.

STATEMENT OF THE CASE

I. PRELIMINARY STATEMENT

This is an appeal from a Judgment and Commitment Order entered in the matter of United States of America v. Clyde O. Leach, Criminal No. 74-24, in the United States District Court for the District of Vermont. Clyde O. Leach (hereinafter referred to as Leach) was found guilty after jury trial of violating 18 U.S.C. 2312-Interstate Transportation of a Stolen Motor Vehicle. The Honorable James S. Holden, Chief Judge, United States District Court for the District of Vermont, presided.

II. PROCEEDINGS PRIOR TO TRIAL

Leach was arrested February 25, 1974, appeared before the United States Magistrate who set bond at \$5,000.00 and appointed counsel. A one-count indictment charging Leach with the violation of 28 U.S.C. 2312 was filed with the Court February 28, 1974. Leach was arraigned in United States District Court March 1, 1974, at which time the Court denied the motion filed on his behalf to reduce bail. The motion was renewed March 5, 1974, heard March 8, 1974, and again denied. Leach posted bail March 12, 1974.

Motions pursuant to Rule 16(a) Federal Rules of Criminal Procedure were filed March 8, 1974. Memoranda supporting the Request for Discovery and Production and in support of the Motion for Production of Grand Jury minutes were filed March 18, 1974, and April 8,

1974. The Motions were heard May 3, 1974. The Court allowed a substantial portion of the requested Discovery but denied the Request for the Minutes of the Grand Jury proceedings, instead requiring the Government to furnish a list of witnesses.

The Government moved to compel Leach to supply handwriting exemplars, which motion was granted May 15, 1974, following a hearing. Leach, with counsel present, supplied the exemplars May 24, 1974.

A Petition to Enter a Plea of Guilty was executed by Leach in open court June 12, 1974, and was accepted by the Court. His plea of guilty was tendered and accepted that date.

By written motion Leach requested permission to withdraw his guilty plea on July 8, 1974. The motion was granted July 11, 1974 following a hearing.

Prior to the commencement of trial July 23, 1974, counsel for Leach moved the Court to dismiss the indictment as the testimony presented to the Grand Jury consisted almost entirely of hearsay; the motion was denied (Tr. 96-100).

III. PROCEEDINGS DURING TRIAL

Trial commenced July 23, 1974. Prior to the opening of evidence, Leach's motion for a mis-trial was denied. The opening remarks of the Prosecutor to the jury which referred to the Grand Jury and the indictment returned by that body, provided the impetus for the motion for mis-trial. (Tr. 104).

In the course of the testimony of Government witness Frank Baker, a hearing was held out of the presence of the jury to determine whether his in-court identification of Leach was tainted by a prejudicial or unduly suggestive display of photographs presented to Baker. Baker's identification of Leach was sustained.

(Tr. 188, 200). Leach's Motion to Suppress the statement he made to Special Agent James C. Mee of the Federal Bureau of Investigation January 25, 1974, was denied (Tr. 240). At the close of the presentation of evidence by the Government, Leach's motion for a directed verdict of acquittal was denied as was the renewal of his motion to dismiss the indictment (Tr. 284-287). These motions were renewed at the close of all evidence and were denied (Tr. 414). His motions for a new trial and for a judgment notwithstanding the verdict were heard and denied September 29, 1974. Sentence was imposed November 19, 1974. Leach was sentenced to the custody of the Attorney General of the United States for a period of four years to be served upon his release from State confinement.

IV. FACTS

A. Evidence Presented by the United States of America.

In general, the prosecution presented evidence in an effort to establish that on February 2, 1974, Leach, along with a salesman from Lindholm Motors, Rutland, Vermont, took a test ride in a beige-tan Volkswagen convertible with a black top. That night, at about 11:00 P.M., the salesman who showed the automobile to Leach observed the automobile to be at Lindholm Motors. On

February 4, 1974, the automobile was sold to Valley Motors, Manchester, New Hampshire, by a man identified by the purchaser as Clyde O. Leach. Leach was arrested January 25, 1974, and allegedly gave a statement to Special Agent James C. Mee of the Federal Bureau of Investigation to the effect that he stole the automobile from Lindholm Motors and drove it to Manchester, New Hampshire, where he disposed of it.

James B. Sennett testified that he was a salesman at Lindholm Motors, Rutland, Vermont, on February 2, 1974, when Leach, accompanied by Edgar Bousley arrived at the dealership. The three of them took a test ride in the beige-tan Volkswagen with the black convertible top. Leach was the driver.

The automobile ran out of gas near the lot (Tr. 112). After some difficulty was encountered restarting the car, the test ride resumed and, after picking up Leach's "wife" they rode up Mendon Mountain and then returned to the dealership. Leach and his "wife" remained in the car while Sennett and Bousley returned to the dealership (Tr. 113). Leach returned the car to its original position and returned the keys to Sennett (Tr. 114). Leach and his "wife" had remained in the car for five or ten minutes. Sennett noticed the car missing on Monday morning and reported it to the police (Tr. 115). Eventually, Sennett retrieved the automobile at Valley Motors, Manchester, New Hampshire; the automobile had an ignition key in it when Sennett picked it up (Tr. 117).

Edgar Bousley testified that he knew Leach. He corroborated Sennett's testimony about the test drive, the breakdown, and the events when the four persons returned to the dealership from the test drive (Tr. 132-135). At Bousley's home after the test drive, Leach told Bousley that he had the key and that he intended to take the Volkswagen later on (Tr. 136-137). Bousley told Leach he wanted no part of the matter. Later that night Leach returned to Bousley's house and asked Bousley if he was going with Leach. Bousley refused.

Bousley has a substantial felony record including statutory rape, breaking and entering, grand larceny and cashing forged checks (Tr. 132). His reputation for truth and veracity was characterized as "hot and cold" by Government witness Reginald Lafley (Tr. 408).

Douglas Shand testified that he saw Leach over the weekend of February 2 - 3, 1974. They discussed the purchase of an automobile and Shand agreed to purchase the car for \$1750.00 although he had not seen the car (Tr. 160). He testified he saw Leach about 7:30 on February 3, 1974 (Tr. 156) but told the F.B.I. that he saw Mr. Leach in the early morning of February 3, 1974 (Tr. 167-168). The week before the trial Shand came to the office of Leach's counsel looking for his license plate and discussed the case with Leach's counsel (Tr. 161-168). Shand admitted to a felony record (Tr. 156).

Frank Baker of Manchester, New Hampshire, testified that on February 4, 1974, he purchased the Volkswagen in question from Clyde Leach for \$250.00 which Baker knew to be a very low price. (Tr. 205-206). Leach signed a piece of paper which purported to be a bill of sale (Tr. 202-203). The bill of sale bore the vehicle identification number 1502308702 (Tr. 205). The automobile had a key in the ignition (Tr. 206).

Baker testified, on cross examination, that he did not contact the Vermont Department of Motor Vehicles until after the purchase was completed, that he did not compare the registration card Leach presented to him with the license plates on the car (Tr. 209-210).

Prior to trial, Baker was shown a display of photographs by Gordon Adams of the Vermont State Police, which spread of photographs included a picture of Leach. Baker selected Leach's picture from this display of photographs. (Tr. 180-200).

Special Agent James C. Mee of the Federal Bureau of Investigation interviewed Leach following his arrest. The interview took place at the Rutland Correctional Center February 25, 1974. He advised Leach of his rights and then proceeded to question him about the Volkswagen which was removed from Lindholm Motors (Tr. 240-242). Leach signed a Waiver of Rights (Tr. 248). Leach told Mee that on February 2, 1974, he and Edgar Bousley tried out a Volkswagen at Lindholm Motors. During the try-out Leach took one of the ignition keys prior to returning the car to the salesman. Leach

told Mee that during the night of February 2, 1974, using the key he had stolen, he returned to Lindholm Motors and drove away with the Volkswagen. He put Vermont license plates on it which he had obtained from Douglas Shand and thereafter disposed of the automobile in Manchester, New Hampshire for \$250.00 (Tr. 249-250). It was to Agent Mee that Leach supplied the handwriting exemplars previously ordered by the Court (Tr. 250). Mee forwarded the handwriting exemplars together with the signed Waiver of Rights and the bill of sale to the F.B.I. laboratory for examination.

Thomas A. Delaney of the Federal Bureau of Investigation, a handwriting expert, testified that upon comparing the handwriting exemplars furnished by Leach with the signatures appearing on the bill of sale (Government's Exhibit No. 1) that Leach was the author of both signatures.

B. Evidence Presented by Clyde O. Leach.

Evidence was presented on behalf of Leach that he, in fact, did try out the automobile in question but that he did not steal it. Rather, on the night of February 2, 1974, he was driven to Manchester, Vermont, the home of his mother, Mrs. Pearl Coli, who then drove him to Albany, New York, where he took a bus for Danville, Illinois, the home of his wife and daughter. He arrived in Danville, Illinois, the morning of February 4, 1974, and remained there for about ten days.

Dale Bittner of Rutland, Vermont, testified that on February 2, 1974, he received a telephone call from Leach who requested that Bittner take him to his mother's house in Manchester, Vermont. Bittner received the call some time after 6:00 P.M. and later that evening picked up Leach at the Howard Johnson restaurant and, along with his wife, Linda Bittner, drove Leach to Manchester, Vermont, where he left Leach with his mother, Mrs. Coli (Tr. 290-293). Bittner remembers the date precisely as his son's birthday was the next day and he was to go to Brattleboro for that day.

Bittner also testified that he and his wife had encountered Mr. and Mrs. Bousley at the Ames Department Store and thereafter the four of them returned to Bousley's house where they discussed the case. Later, Bittner received a telephone call from Mr. Bousley and thereafter his wife disappeared.

Bittner's record includes convictions for the sale of marijuana and possession of regulated drugs.

Leach testified on his own behalf. He agreed that he tried out a 1970 Volkswagen on February 2, 1974, at Lindholm Motors along with Edgar Bousley. During the initial part of the test drive the car ran out of gas and he and Bousley pushed it back to Lindholm Motors where Leach undertook to get the automobile started after the gas was put in (Tr. 305). While Leach was working on the motor, attempting to get it started, Bousley was sitting inside the automobile, alone, trying to start it with the key (Tr. 305). The test drive resumed, Florence Carter, allegedly Leach's wife,

was picked up and the four persons drove the car up the Mendon Mountain and returned to Lindholm's. When the four of them returned, Leach and Mrs. Carter sat in the automobile which was returned to its place in the line discussing the possible purchase of it. They returned to the showroom where Leach handed the salesman the keys. Thereafter, Bousley, Leach and Florence Carter departed in Bousley's car and drove to Bousley's house (Tr. 306-308). Bousley then took Leach home. Early that evening Leach called Bittner to request that Bittner take Leach to his mother's house. Bittner and his wife, Linda, picked Leach up at Howard Johnson's restaurant about 8:00 or 8:15 P.M. February 2, 1974, and drove him to Manchester, Vermont, the home of his mother (Tr. 309-310). Leach's mother drove him to Albany, New York, shortly after he arrived in Manchester (Tr. 310). Leach denied that he had ever been to Valley Motors in Manchester, New Hampshire (Tr. 310).

Leach denied that the signatures on the bill of sale (Government Exhibit No. 1) were his signatures (Tr. 311).

Leach testified that on or about January 25, 1974, he picked up some money at the Western Union office in Albany, New York, which had been wired to him from Danville, Illinois, for the purpose of covering his bus fare to Danville where his wife and child live (Tr. 313-316).

Leach denied that he borrowed license plates from Douglas Shand on February 2, 1974, and that he agreed to sell the subject

Volkswagen to Shand. He also denied displaying to Bousley the Volkswagen key and telling Bousley that he intended to steal the Volkswagen that they had driven. He also denied telling Agent Mee that he took the automobile in question (Tr. 316,323).

Leach took a bus from Albany, New York, leaving Albany some time after midnight February 3, 1974, and arrived in Danville, Illinois, on February 4, 1974. En route, he called his wife at about 4:00 A.M. the morning of February 4, 1974 (Tr. 317-318).

He stayed with his wife for about ten to twelve days. On February 5, 1974, Mrs. Leach made an appointment with the local Legal Aid office for her and her husband and on February 7, 1974, he executed an affidavit while in Illinois which he understood to complete adoption papers for his daughter (Defendant's Exhibit D) (Tr. 319-320).

Donna Leach, wife of Clyde Leach, corroborated the testimony of her husband. She lives in Danville, Illinois, where she is employed as a homemaker taking care of elderly people. She called her mother-in-law, Pearl Coli, on February 2, 1974, and was told by Mrs. Coli that she would be seeing her husband in a couple of days. She was aware that her daughter had sent money to Leach in late January, 1974, for the purpose of enabling him to come to Illinois (Tr. 369-370).

Leach arrived at her home at 9:00 A.M., February 4, 1974. She was 100% certain of the date (Tr. 360, 383).

On February 5, 1974, the day after Leach arrived, she made an appointment with the lawyer for February 7, 1974, to have their daughter's name changed from Morse to Leach. Leach was present when the appointment was made. They both signed affidavits incident to the name change (Tr. 362) (see Defendant's Exhibits D and F). Mrs. Leach's testimony concerning the telephone call on February 2, 1974, to Mrs. Coli was substantiated by Defendant's Exhibit G, Mrs. Leach's statement for toll charges (Tr. 368).

ARGUMENTPOINT I

The Court Should Have Dismissed the Indictment As It Was Based
Almost Entirely on the Hearsay Testimony of Special Agent James C.
Mee of the Federal Bureau of Investigation

The one-count indictment charging Leach with a violation of 18 U.S.C. 2312 was returned February 28, 1974. The evidence presented to the Grand Jury consisted of the testimony of Special Agent James C. Mee of the Federal Bureau of Investigation, only (App.1-3). Counsel for Leach filed a Motion requesting production of the Grand Jury minutes in order to determine whether the indictment was based on hearsay. The Motion was heard and denied May 3, 1974 (App.4-8). The Motion was renewed when the Grand Jury minutes were produced (Tr. 96-99) at the close of the presentation of the Government's case (Tr. 286-287) and again at the close of all evidence (Tr. 414-415) (App.9-12).

Use of hearsay evidence before the Grand Jury is permissible Costello v. United States 350 U.S. 359, 76 S.Ct 406, 100 L.ed. 397 (1956). However, Costello, supra. is not viewed in this Circuit as an invitation to prosecutors to make wholesale, indiscriminate use of second-hand evidence in its presentations to the Grand Jury. "Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon

witnesses able to testify to facts from personal knowledge."

United States v. Umans 368 F. 2d 725,730 (2d Cir. 1966), United States v. Barash 412 F. 2d 26 (2d Cir. 1969). (Emphasis supplied).

Prosecution of Costello and Barash involved alleged violations of the Internal Revenue Code with multiple witnesses appearing at trial. In Costello, supra., no witnesses other than Government agents appeared before the Grand Jury. The prosecution of Barash involved four Grand Juries and over 40 witnesses. An Internal Revenue Inspector summarized the evidence before the Grand Jury which ultimately indicted Barash. In these complex circumstances the use of hearsay testimony was approved.

The prosecution in this case was not faced with the same evidentiary burdens encountered in the Costello and Barash prosecutions. No attempt was made to establish that the direct testimony of any persons witnesses to or involved in the case was unavailable, or that it was demonstrably inconvenient to summon such witnesses. In fact, it does not appear in the minutes of the Grand Jury, or from any other source, that witnesses were unavailable or that the summoning of witnesses to testify before the Grand Jury would have been a burdensome undertaking for the prosecution. Rather, the contrary is apparent from an examination of these minutes and the trial transcript. The matter was presented to the Grand Jury in Rutland, Vermont, February 28, 1974. Lindholm Motors is located in that city, about a mile from the Federal Building, yet no witness from that establishment was called.

Edgar Lee Bousley and Douglas Brian Shand, both residents of the City of Rutland, Vermont, did not testify before the Grand Jury. James P. Sennett, the salesman who demonstrated the vehicle to Leach, was not called to testify. Frank Baker who allegedly purchased the automobile from Leach did not testify. He lived in or near Manchester, New Hampshire - about two hours from Rutland, Vermont. The singular witness before the Grand Jury was Special Agent Mee whose three-page testimony consisted of only one sentence of direct evidence - a terse synopsis of his alleged interview with Leach (App.3). The remainder of his testimony was clearly hearsay. There is no indication in these minutes that he had any direct knowledge of the events to which he gave testimony. In United States v. Harrington 490 F. 2d 487 (2d Cir. 1973) this court noted that it is impermissible to have law enforcement officers testify before Grand Juries as if they have firsthand knowledge of the facts the Grand Jury is then considering, when in fact they possess no such knowledge. In United States v. Daneals 370 F. Supp. 1289 (D.C.N.Y. 1974) the District Court dismissed numerous indictments returned for alleged violations of the Selective Service Act. There, as here, no person testifying before the Grand Jury had firsthand knowledge of the case, and there, as here, the Grand Jury was given the impression the witness or witnesses had personal familiarity with the matters to which they testified. The brief presentation of each case also contributed to the dismissals - less than one-half minute of testimony in many cases.

A pattern of excessive use of hearsay in the presentation of evidence to grand juries led this Court to order a reversal and dismissal of an indictment in United States v. Estepa 471 F. 2d 1132 (2d Cir. 1972). The Court condemned the Grand Jury proceeding in Estepa supra. because the Government misled the Grand Jury into believing it was hearing eyewitness testimony and thereby was prevented from exercising its prerogative to obtain additional evidence. Agent Mee's testimony, nearly entirely hearsay, makes no clear distinction between that evidence he presented from his own knowledge and that evidence which is his repetition of statements of others. *

An in camera examination of the Grand Jury minutes is required where it appears that the Grand Jury has heard only hearsay testimony in order to make a determination as to whether the Grand Jury was misled into believing it was getting an eyewitness report. United States v. Ramirez 482 F. 2d 807 (2d Cir. 1973). Here,

* The danger inherent in "undue reliance upon hearsay...." United States v. Estepa, supra., is reinforced by the minutes of these Grand Jury proceedings. Special Agent Mee testified that Sennett identified Leach from a photographic display (App. 1-3). Without elaborating on the propriety of this testimony or the failure to display the spread to the Grand Jury, or the failure to have identifying witness on hand, it is noteworthy that at trial, before the Grand Jury minutes were made available to Defendant, Frank Baker, not James P. Sennett, testified as to the out-of-court identification made of Leach from a photographic spread. Either Special Agent Mee's testimony was erroneous - the precise danger sought to be avoided by the restrictions on the use of hearsay before the Grand Jury - or Sennett's in-court identification of Leach was made without proper foundation and without the required preliminary proceedings outside the presence of the jury.

counsel made timely motion and presented a sufficient basis to alert the District Court to the inferior quality of evidence presented to the Grand Jury, (App.4-8) and renewed the motion repeatedly, yet no examination by the Court occurred until the close of all evidence (Tr. 414) (App.9-12) at which time the Court, after hearing all the evidence, was obviously not disposed to grant the motion.

This conviction must be reversed and the case remanded with orders to dismiss the indictment in view of the hearsay evidence presented to the Grand Jury, the failure of the prosecution to demonstrate the unavailability of direct testimony, the failure of the prosecution to demonstrate the inconvenience of summoning witnesses to give direct testimony, the failure of the Court to make a timely in camera inspection of the Grand Jury minutes and the misleading nature of the testimony submitted to the Grand Jury.

POINT II

The Court Erred in Failing to Grant Defendant's Motion for a Mistrial Due to the Opening Remarks of the Prosecutor Who Made Prejudicial Reference to the Grand Jury.

The purpose of an opening statement is to inform the jury of what the case is about and to outline the expected proofs so that the jury may more intelligently follow the testimony. Foster v. United States 308 F. 2d 751 (8th Cir. 1961). Opening remarks

should not be used to poison the minds of the jury against the Defendant before the jury has heard the evidence or to improperly prejudice the Defendant in the eyes of the jury. United States v. Signer 482 F. 2d 394 (6th Cir. 1973).

In its prefatory remarks to the jury, the Court briefly explained that an indictment had been returned by the Grand Jury and explained its purpose. The Court further explained that indictment "affords no inference whatsoever of guilty." (Tr. 21). Selection of the jury followed and trial commenced.

In his opening remarks to the jury, counsel for the United States said:

"It is my duty today and a duty I take with enthusiasm, to represent the Government in a criminal case which is before you for trial. It was brought before you for trial pursuant to an indictment returned by the Grand Jury.

"The Grand Jury is a group of people much like yourselves except larger in number and they found that there was probable cause to the issue in the indictment which...." (Tr. 104).

At this point Leach's counsel objected and moved for a mistrial which motion was denied (Tr. 105).

It is clear that reference to the Grand Jury and its composition

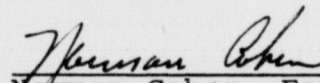
is outside the permissible contents of the opening remarks which must be prospective, that is, they must pertain to the evidence the United States expects to produce in support of the charge against the Defendant. There is no conceivable connection between the expected development of the proof and the Grand Jury, its composition, or the fact that it returned an indictment. The reference to this matter, then, can be viewed only as an effort to implant in the minds of the jurors, to the unquestioned prejudice of Leach, that a group of members of the same community, at least twelve in number, had determined there was sufficient cause to believe Leach had been involved in some wrongdoing. Immediately, then, Leach was stripped of the presumption of innocence he is, under normal circumstances, constitutionally afforded. The legitimate purpose of the opening statement had been manifestly distorted and Leach had been put at a substantial and unwarranted disadvantage.

CONCLUSION

The conviction in this case must be reversed and the indictment dismissed because of the excessive use of hearsay testimony before the Grand Jury, the failure of the Government to demonstrate the necessity for resort to such testimony, and the failure of the Government to adequately distinguish for the Grand Jury those portions of Special Agent Mee's testimony which constituted its observations of the events and those portions of the testimony which were not a first-person report thereby misleading the Grand Jury into believing it was receiving completely eyewitness testimony. Moreover, reversal is required in view of the prejudicial remarks made by the Prosecutor in his opening statement, which remarks served no purpose other than to cast the Defendant in an unfavorable light in the eyes of the jury even before the introduction of any evidence.

Dated at Rutland, Vermont, this 26th day of February, 1975.

Respectfully submitted,


Norman Cohen, Esq.
Attorney for Clyde O. Leach
P. O. Box 755
26 West Street
Rutland, Vermont 05701
(Appointed by this Court)

CERTIFICATE OF SERVICE

I, Norman Cohen, Esq. hereby certify that I have served the foregoing Brief and Appendix of Appellant Clyde O. Leach upon the United States of America by mailing a copy of the same, postage prepaid to David A. Reed, Esq., Assistant United States Attorney, P. O. Box 10, Rutland, Vermont 05701, this 26th day of February, 1975.

Norman Cohen
Norman Cohen, Esq.

